



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

31151

B-177763

July 9, 1973

Molecular Energy Corporation
132 Floral Avenue
Murray Hill, New Jersey 07974

Attention: Mr. Leon Braun
President

Gentlemen:

We refer to your letter of May 29, 1973, requesting reconsideration of our decision of April 10, 1973, affirmed by decision of May 22, 1973, denying your protest against award of a contract to any firm other than Molecular under Invitation for Bids No. N00017-73-B-1107, issued by the Navy Purchasing Office, Washington, D. C. Award was made to Yardney Electric Corporation on April 17, 1973.

In our initial consideration of your protest before award you argued that although the solicitation did not list destination points for the items in question (batteries), it was feasible to evaluate transportation costs for f.o.b. origin bids because the destination points generally were known and the shipping weights of the batteries were readily ascertainable. You pointed out that in fact the Navy procurement officials calculated the transportation costs by estimating that half of the batteries would go to Yorktown, Virginia, and half to San Francisco, California. Since the six possible destination points to which these batteries would be shipped include Yorktown (Virginia), Charleston (South Carolina), and Earle (New Jersey) on the east coast, and Keyport (Washington), San Diego (California), and Concord (California) on the west coast, you contended that tentative destination points and quantities to each destination point easily could have been established for bid evaluation purposes.

The Navy reported however that when the solicitation was drafted it was the contracting officer's judgment that the destination points were so much a matter of speculation as to make it impracticable for the Command to realistically project where deliveries would be made when the batteries were delivered from

~~720255~~ 091386

eight to twenty-two months after the award. The Navy reported that the solicitation was specifically drafted so as to exclude the factor of transportation costs from the evaluation of bids. It was the Navy's view that the provisions of "the IFB made it inescapably clear to any prospective bidder that the Command did not intend to evaluate transportation costs in determining the lowest overall cost to the Government under this procurement."

We held in our decision of April 10 that there was no basis for our Office to conclude that the Navy contracting officer's determination to exclude consideration of transportation costs in evaluation of the bids was arbitrary or otherwise improper. This conclusion, as more fully set forth in our decision, was based primarily upon agreement with the Navy that in the circumstances reported the applicable regulation (ASPR 19-208.4(b)) provided that bids "shall be solicited f.o.b. origin only * * * and evaluation will be made without regard for transportation cost * * *," and that the subject invitation did not provide for the evaluation of such costs. As stated in our prior decision, justification for reliance upon the cited regulation was the contracting officer's "understanding that it was impracticable to determine either general or tentative delivery points" for the purpose of evaluating transportation costs at the time the solicitation was issued. While you disputed the Navy's justification for application of the cited regulation and our interpretation of the solicitation, we rejected your position for the reasons stated in the prior decision.

In again requesting reconsideration of this matter, you take issue with the Navy's position regarding its intention not to evaluate transportation costs. It is your belief that no such intention existed until after the bids were opened. In this connection, you contend that the requiring activity furnished the purchasing office tentative destination points upon requisitioning the batteries. You point out that the contracting officer did not document the file with his justification for excluding transportation costs as required by ASPR 19-208.4(b). Therefore, you contend that subparagraph (a) of the cited regulation must be applied as tentative destination points are available for the purpose of evaluating transportation costs. Furthermore, you contend that transportation costs must be considered because the solicitation provides that the contract will be awarded to the bidder whose bid is "most advantageous to the Government, price and other factors considered," and "other factors" includes transportation costs.

B-177763

You conclude that if the Navy had undertaken to evaluate transportation costs, such an evaluation would have been legally justified. Moreover, you argue that ASPR 19-208.4(a) requires their consideration. Therefore, you question the Navy's right to ignore this element of cost in the instant situation.

As previously indicated, the Navy has stated that the contracting officer made a determination prior to issuance of the solicitation not to evaluate transportation costs, even though he failed to so document the file. It appears that while the requiring activity furnished delivery points, the contracting officer made the determination that their use was not practicable for evaluating transportation costs. In this regard, the Navy has reported that in recent years solicitations for the subject batteries have not provided for the evaluation of transportation costs for the same reason advanced in the instant case. In these circumstances, we do not find a sufficient basis for questioning the Navy's position that evaluation of transportation costs was not contemplated when the solicitation was prepared.

Although consideration of transportation costs was not specifically excluded by the terms of the instant solicitation, we believe that the most reasonable import of the solicitation was that their consideration was not contemplated, even though a clause required by ASPR 19-208.4(b) (ASPR 7-104.72) was not included in the solicitation. In this regard, it should also be noted that destination points were not provided and that transportation costs were not included in the "other factors" for consideration in determining the low bidder.

Therefore, we find no basis to conclude that the Navy's evaluation of bids was contrary to the terms of the solicitation. Though the contracting officer's determination concerning the impracticability of estimating tentative delivery points for the purpose of evaluating transportation costs has come into question as a result of the bids received, we do not believe that this fact requires the conclusion that his determination was improper at the time the solicitation was issued. Hence, we do not agree that subparagraph (a) of the cited regulation is applicable so as to require consideration of transportation costs.

Bids may not be evaluated contrary to terms specified in the solicitation. As we have concluded that the most reasonable import of the instant solicitation was to the effect that transportation costs were not included in the "other factors" for consideration in determining the low bidder, it is our view that consideration of transportation costs would be improper. 30 Comp. Gen. 447, 454

B-177763

(1970). While you contend that the failure to include consideration of such costs in the evaluation will result in increased costs, we have many times stated that it is infinitely more in the public interest to maintain the established principles of formal competitive procurement by Government agencies than to obtain a pecuniary advantage in a particular case by a violation of those principles.

Accordingly, our decision of April 10, 1973, is again affirmed.

Sincerely yours,

Paul G. Doebling

Acting Comptroller General
of the United States